

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 VOTER REFERENCE FOUNDATION, LLC, et al.

4 Plaintiffs,

5 vs. NO: 22-CIV-0222 JB/KK

6 HECTOR BALDERAS, et al.,

7 Defendants.
8

9 Transcript of hearing before The Honorable James
10 O. Browning, United States District Judge,
11 Albuquerque, Bernalillo County, New Mexico,
12 commencing on June 2, 2022. Proceedings recorded by
13 mechanical stenography, transcript produced by
14 computer.
15

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Matthew Miller

17 For the Defendants: Olga Serafimova
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1 THE COURT: Good morning, everyone.
2 Appreciate everyone making themselves available to
3 me this morning.

4 The Court will call Voter Reference
5 Foundation, LLC, et al., versus Hector Balderas, et
6 al., Civil Matter Number 22-CIV-0222 JB/KK.

7 If counsel will enter their appearances
8 for the Plaintiffs.

9 MR. GREIM: Eddie Greim and Matt Miller,
10 who's off screen here, for Voter Reference
11 Foundation.

12 THE COURT: All right. Mr. Greim,
13 Mr. Miller, good morning to you.

14 And for the Defendant?

15 MS. SERAFIMOVA: Good morning. Olga
16 Serafimova for the Defendants.

17 THE COURT: Ms. Serafimova, good morning
18 to you.

19 Well, I think y'all have consented to
20 me -- as y'all know, I was supposed to be in
21 Oklahoma this week trying an assault with attempt to
22 murder case, and I think they had some witness
23 issues, so it got moved to July, and so I decided to
24 skedaddle over here and play grandpa for a couple of
25 days, so I appreciate the courtesy of y'all letting

1 me do this by Zoom and out of district.

2 Is that correct that you consent to that?

3 Mr. Greim?

4 MR. GREIM: We do, Your Honor.

5 THE COURT: Ms. Serafimova?

6 MS. SERAFIMOVA: Yes, Your Honor.

7 THE COURT: I appreciate that courtesy. I
8 know y'all want to talk scheduling. It's a shame --
9 I think at y'all's end we did offer -- before I came
10 over here, I did offer this week since it cleared
11 up, but I understand y'all had some witness issues
12 that kept y'all from doing it this week, and then
13 y'all had proposed dates that are just tough for me
14 because of a busy summer.

15 But let me hear from you, Mr. Greim.
16 We'll start with you, and we'll see if we can bang
17 out some time to get together. Like I said, I'm
18 pretty flexible. If your witnesses need to appear
19 by Zoom, y'all need to appear by Zoom, I'm pretty
20 flexible, so if that helps any.

21 Mr. Greim?

22 MR. GREIM: Sure. Thank you, Your Honor.

23 You know, I think in reflecting -- having had some
24 time to reflect on our motion, on our theories, and
25 on, you know, really what the key facts are going to

1 be, we've had more time since the hearing than we
2 really had coming into it, and also we were able to
3 digest the positions that the secretary of state has
4 had.

5 I think we can do -- we do need to get
6 together again, but I think it can be short. I know
7 there was a sense that, you know, I had just kind of
8 started with Ms. Vigil, I think, and then we still
9 had Mr. Kurtas and Ms. Pino still to come, and we
10 were even going to have closing statements.

11 Had you asked me when we were leaving that
12 day and rushing to catch our little plane, I would
13 have thought that we needed probably the same amount
14 of time all over again. In fact, Your Honor, you
15 know, I don't have much more for Ms. Vigil.

16 You know, our main theory here is really,
17 at this point, going to be with overbreadth based on
18 what Ms. Vigil -- what she said just in the time I
19 had with her. We're keeping our other theories as
20 well. We're going to focus more on overbreadth.
21 What we need, Your Honor, we basically have in the
22 documents, almost all of which are admitted. And so
23 all that we would need to do is finish up a few
24 minutes with Ms. Vigil.

25 We know that the State wants to then walk

1 through some issues with her, but then I think we're
2 done at that point. We would submit a declaration
3 that authenticates the few exhibits that aren't in
4 yet, and we would move that those be admitted,
5 basically some emails of Mr. Kurtas, but we don't
6 need him or Ms. Pino to present this. You know, I
7 think maybe our time is even better spent just with
8 maybe making some sort of a short closing, answering
9 your other questions, and then filing some sort of
10 papers to address the legal issues that you raised a
11 few weeks ago.

12 And so we're looking at cost, expense, the
13 amount of time since we filed this motion that our
14 things -- our data has been down. We just want to
15 bring this to a conclusion, and we really do not
16 want to have this extend out into July or even
17 later. So that's our proposal.

18 Now, much of June is available for us.
19 This week, you know, would have worked. You know,
20 my only bad days are the 13th and 14th of June, so
21 we can make a lot of June work.

22 THE COURT: Well, I mean, could you make
23 today and something tomorrow?

24 MS. SERAFIMOVA: Your Honor, if I may.

25 THE COURT: Let me finish with Mr. Greim,

1 and then I'll hear from you, Ms. Serafimova.

2 MR. GREIM: I think my only issue with
3 tomorrow -- I misspoke, because tomorrow morning my
4 wife and I are flying to our 20-year law school
5 reunion. I am out for tomorrow. We've got to make
6 an emergency filing in the Michigan Supreme Court
7 today on an election matter. You know, I'm sorry.
8 I've also got to go to Washington, DC, on Tuesday
9 the 7th for a -- to produce a witness, but otherwise
10 I'm good.

11 Just to restate, not to confuse things too
12 much, my unavailable days are tomorrow, the 3rd --
13 well, they're today, tomorrow the 3rd, and the 7th
14 and then the 13th and 14th.

15 Otherwise, you know, we don't need very
16 long at all.

17 THE COURT: All right. Ms. Serafimova,
18 what's your thoughts about a continuation of the
19 hearing?

20 MS. SERAFIMOVA: Thank you, Your Honor.
21 So I am not prepared to discuss this in June, today,
22 because that was not -- you know, it wasn't my
23 understanding that's what we would be discussing.

24 But as far as witnesses, Your Honor, we do
25 have some testimony to put on from Ms. Vigil, and we

1 also need to call Ms. Pino. I understand that
2 Plaintiff no longer wishes to call her, and that's
3 fine, but she's on the witness list.

4 We do have all of the theories, the ones
5 that are briefed anyway. We're not withdrawing any
6 of them, so we do need to address all of them, so we
7 do need to put on our two witnesses that we were
8 relying on to be able to put on initially with the
9 witness list that we agreed to. They may be
10 available in June. I don't know right now. If you
11 give me a few minutes, I can hopefully get some
12 dates for June.

13 The only other thing I wanted to bring to
14 the Court's attention is if you remember during the
15 last hearing, Plaintiff said that they do have a
16 new, perhaps, alternative theory, and I just want to
17 make sure. You know, I asked them to amend the
18 complaint and to amend the motion. They said
19 they're not going to do that at this point. So I
20 just want to kind of ask the Court that, you know,
21 the motion for preliminary injunction be decided on
22 the grounds that have been briefed and that have
23 been presented to us. We can't defend a theory that
24 we don't know anything about, that we haven't seen,
25 that we haven't had an opportunity to respond to in

1 writing or otherwise.

2 But as far as June dates -- the other
3 thing is I am currently on COVID leave and will be
4 until the end of next week, but after that, after
5 Monday the 13th, I can ask for dates from our two
6 main witnesses, and hopefully we can -- well, we had
7 given -- I'm sorry. I actually might have that
8 information. We had given some dates. And
9 actually, we were originally available on June 1st.
10 You know, of course I didn't know at the time I
11 would be on COVID leave. That just came up
12 yesterday.

13 THE COURT: What is your first date of
14 availability, Mr. Greim?

15 MR. GREIM: I would say it's Monday the
16 6th. The 6th, 8th, 9th, and 10th are my first dates
17 of availability.

18 MS. SERAFIMOVA: I'm sorry. Could you
19 repeat those?

20 MR. GREIM: Sure. The 6th, 8th, 9th, and
21 10th.

22 MS. SERAFIMOVA: Yeah, I'm afraid I'm out
23 all of next week.

24 THE COURT: Well, here's what I was going
25 to suggest. I've got to be in Denver on the 6th.

1 I'm training a group of the new judges that Biden
2 has appointed on the codes of conduct and on ethics,
3 but I don't think I start until the afternoon. If
4 everybody would be willing to call witnesses -- I
5 know you're on COVID leave, Ms. Serafimova. If
6 everybody would be willing to call them by -- call
7 them by Zoom and let me do it from Denver, I could
8 do the morning, because I don't think I have any
9 hearings.

10 MS. SERAFIMOVA: So the thing is, Your
11 Honor, my almost two-year-old was exposed at
12 daycare, and that's why we're on COVID leave. We're
13 also starting to show symptoms. She's quarantining
14 until the end of next week, so I have a 23-month-old
15 on my hands, so I'm not going to be able to.

16 THE COURT: Well, what do you want to do,
17 Mr. Greim? I mean, you want to force the issue and
18 set it for -- by Zoom on Monday morning?

19 MR. GREIM: I mean, based on what counsel
20 was saying, I mean, my client wants to save money,
21 get this done, but just as a professional courtesy,
22 I -- and being the father of five kids, I mean, I --
23 it's hard to imagine her dealing with a two-year-old
24 in an apartment there, or her home, while she's
25 trying to do the examination. But I mean, I guess

1 what -- it sounds like we may have other dates,
2 though, I mean, later in the week or maybe the 15th,
3 16th, or 17th.

4 MS. SERAFIMOVA: If you give me a couple
5 of minutes, I can check on the 15th, 16th, 17th. I
6 know I'm available those dates.

7 By the way, Mr. Greim, I appreciate the
8 courtesy.

9 THE COURT: Well, the 9th and 10th and
10 it's also the 13th, correct, Ms. Rotonda, they
11 expect a three-day trial in that Washington case?
12 Is that correct?

13 MR. ROTONDA: Yes, that's correct, Judge.

14 THE COURT: We've marked those three days
15 off for trial. As soon as this hearing is over, I'm
16 going to go into pretrial conference with them, so I
17 may know a little bit more. Mr. Harrison -- Ryan
18 Villa is the defense lawyer on that, so certainly
19 from my standpoint, the 9th and 10th, if that trial
20 were to go away, would be better than the following
21 week. All my -- my daughter and all my
22 grandchildren are going to be in that week. I was
23 trying to keep that week light. I've not been able
24 to clear it up entirely, as you can tell, with the
25 trial on the 13th.

1 And I think Ms. Rotonda said the 9th and
2 10th and 13th. You pretty much backed them up
3 anyway, is that right, Ms. Rotonda, so they're
4 pretty full if that trial were to go away?

5 MR. ROTONDA: Yes, that's correct, Judge.

6 THE COURT: Give me an estimate on hours.
7 What are we looking at, Mr. Greim, so we can try to
8 figure out what we're looking at here?

9 MR. GREIM: Your Honor, I'm probably done
10 in 20 more minutes with Ms. Vigil. As far as I'm
11 concerned, we could go straight to, you know,
12 concluding remarks, which would not be substantial.
13 Although the one asterisk is I'm happy to have an
14 extended back-and-forth to talk about the law and
15 the facts, so if we had even a full hour of that,
16 you know -- now, of course Ms. Serafimova would want
17 to go through with Ms. Vigil. I think we could get
18 the whole thing done in two more hours. I don't
19 need much more of that time.

20 THE COURT: What's your estimate,
21 Ms. Serafimova, how long it would take? Is two
22 hours how long it would take, or a little longer?

23 MS. SERAFIMOVA: I think I would need 40
24 minutes with the witnesses. I agree with Mr. Greim,
25 as much time as Your Honor needs to basically -- for

1 us to answer questions and -- but, yes, two hours
2 sounds doable.

3 If I may. Sorry. I was just going to
4 say --

5 THE COURT: So I guess with 40 minutes,
6 we're talking about three hours.

7 So, Ms. Rotonda, if the trial in the
8 Washington trial were to vacate on the 9th, 10th, or
9 13th, do we have three hours that we could give them
10 during those three days?

11 MR. ROTONDA: Judge, the 13th would be the
12 best of those three dates. We could probably
13 squeeze it in in the afternoon.

14 THE COURT: What time would we squeeze it
15 in? What would be the slot?

16 MS. ROTONDA: It looks like you have
17 something at one o'clock, but it should be done by
18 2:00, so I guess 2:00 to 5:00.

19 THE COURT: Would y'all like to take a
20 2:00 to 5:00 backup? I think, you know, there's
21 always a chance this trial, this Washington trial,
22 could go away, and then you'd have a slot. Could
23 you live with a backup of 2:00 to 5:00 on the 13th?
24 That gets Ms. Serafimova out of her sort of COVID
25 week.

1 MR. GREIM: Your Honor, I'm sorry.

2 THE COURT: Go ahead.

3 MR. GREIM: I am out the 13th and 14th.

4 I'm meeting with a bunch of clients in Florida, and
5 we've all coordinated to make those dates work.

6 But I'm not sure we need three hours,
7 though. If I understand correctly, I need about 20
8 more minutes, and then Ms. Serafimova needs another
9 40, and then if we have an hour of argument or
10 discussion with you, that's really two hours. Three
11 may be a safety. I don't know if that makes a
12 difference or not, but --

13 THE COURT: Is that a good estimate,
14 Ms. Serafimova? Two hours?

15 MS. SERAFIMOVA: Well, I was saying 40
16 minutes for my direct, and of course, you know,
17 there will -- we need to address whatever Mr. Greim
18 covers with the witnesses, but --

19 THE COURT: Let me stick with my three
20 hours, then. Seemed like you were more comfortable
21 with that.

22 So what do we have on the 15th,
23 Ms. Rotonda? I can probably get out of -- I think I
24 have a grief counselor at 4:20, but I could move
25 that around. I was thinking about moving that

1 around anyway, with my daughter being in town, so if
2 we were to vacate that, does that give us any more
3 time on the 15th?

4 MS. ROTONDA: Judge, you have -- the last
5 thing in the morning on the 15th is a nine o'clock
6 sentencing. That would be done around ten o'clock,
7 which would only give you two hours before the lunch
8 hour. If we went into the lunch hour, that would be
9 the three, or we could do two hours, break for
10 lunch, then you have a 1:30 sentencing, so estimate
11 another hour for that, and pick up again at maybe,
12 like, say, 2:30.

13 THE COURT: We've got a nine o'clock
14 sentencing. What if we go to ten o'clock, see if we
15 get two, fine? If not, we'll either go into the
16 lunch hour or take a short lunch hour and come back,
17 try to finish up.

18 Does that work for you, Mr. Greim?

19 MR. GREIM: It does, Your Honor.

20 THE COURT: How about you, Ms. Serafimova?

21 MS. SERAFIMOVA: I'm waiting to hear from
22 the witnesses, Your Honor. The secretary of state's
23 general counsel and I are communicating by text, and
24 I just haven't received an answer yet on the 15th.

25 THE COURT: Let's pencil it in, and if it

1 doesn't work, we'll either get back together, or you
2 can talk to Ms. Rotonda about -- I think we're
3 looking at a three-hour slot, and I'll try to -- try
4 to make myself available. We're just running out
5 of -- running out of days in June, but we'll give it
6 a try.

7 MS. SERAFIMOVA: Can I just -- of the days
8 that you offered in July, I'd like to say we can --
9 and I know it's a two-hour slot, but July 8th works
10 with the witnesses, even though they'll be
11 traveling, but they'll make themselves available,
12 and July 20th we have a three-hour window we can
13 make ourselves available.

14 THE COURT: Those are available. The
15 Plaintiff is seeking a preliminary injunction. I
16 want to be responsive and not delay it too much.
17 Let's see -- we'll pencil it in for ten o'clock on
18 the 15th. If that doesn't work, y'all call
19 Ms. Rotonda and work it out with her, and we'll get
20 back on the phone, and we'll try to bang it out
21 together.

22 Let me ask upon something that
23 Ms. Serafimova stated. I want to ask a question
24 about that. Pull up my notes here.

25 Mr. Greim, are the Plaintiffs going to

1 file an amended PI reflecting just the overbreadth
2 count, or are you withdrawing your retaliation
3 theory? Where do we stand on your theories?

4 MR. GREIM: Sure. So before we had
5 overbreadth, and we had viewpoint discrimination,
6 and, you know, either content-based discrimination
7 or viewpoint discrimination. We're keeping all
8 that.

9 The only change there is that I think
10 given that they've now said that they're going to
11 use all the forms, even the old forms are still
12 good. That, you know, it's all about sharing and
13 nothing more, I mean, we disagree with that, but
14 they made that position.

15 So overbreadth is our main theory. We're
16 going to emphasize that. We'll present our case on
17 the viewpoint discrimination.

18 On retaliation, there are two things I
19 mentioned. One is the same conduct that constitutes
20 viewpoint discrimination, which we can see in the
21 referral letter, also constitutes retaliation. So a
22 separate legal theory supports that. I mean,
23 it's -- I don't know if it's really -- it's not a
24 different cause of action, but, you know, the
25 separate legal theory would support that.

1 I mean, I very loathe to go back and amend
2 the PI motion just for that. I think -- I mean,
3 we'll do it if the Court thinks it would actually
4 help. What I think might be better and more
5 efficient is we'll submit some sort of filing to you
6 at the end. I think we talked about findings of
7 fact, conclusions of law. We could also do a brief,
8 just lay out, you know, each theory and the facts
9 that support it. When we get to the point about the
10 referrals and letters, we'll say we have viewpoint
11 discrimination and content discrimination. This
12 reflects a claim for retaliation. That's an
13 independent basis to find the conduct is wrongful.

14 To me, that is the most efficient and
15 least hour-intensive way to handle it. There's no
16 big mystery there about what our claim is.

17 The other admission is we learned in the
18 documents we received internally that they decided
19 not to answer our requests, just not to answer VRF
20 requests. They'll have their reasons for that, but
21 I mean, that is retaliation as well.

22 In this PI, we are not -- you know, we're
23 just really seeking protection so we can repost the
24 data. We're not seeking an order that they also
25 have to answer our requests. We're not -- we're not

1 doing that in this PI. And so since that's the
2 case, we don't need to worry about the retaliation
3 claim. That may be sitting back there.

4 I mean, if we get a preliminary
5 injunction, and they keep not answering just
6 because, we may well be back, but I don't want to
7 dangle too many more things off this. I just want
8 to get to a stopping point and present the theory
9 and move on.

10 THE COURT: All right. Is there anything
11 else we need to discuss while we're together?
12 Anything else I can do for you today?

13 Mr. Greim?

14 MR. GREIM: Nothing else, Your Honor.
15 Thank you for being available on short notice and
16 remotely. We appreciate it.

17 THE COURT: How about you, Ms. Serafimova?

18 MS. SERAFIMOVA: If I may respond, Your
19 Honor, to what was just said.

20 Mr. Greim is stating that essentially the
21 retaliation claim is not relevant to the motion for
22 preliminary injunction. If that's the case, we ask
23 that that claim not be raised at this point. In
24 fairness to us, we haven't had an opportunity to
25 brief it. We haven't seen it, don't know the scope

1 of it. If indeed it doesn't change anything with
2 respect to the relief they're asking for the
3 preliminary injunction stage, we ask that they not
4 bring it up in their -- in their proposed findings.
5 Basically, if they want to add that to the complaint
6 subsequently, by all means we won't oppose the
7 amendment.

8 At this point, I think in fairness, to
9 allow us to waive the summations that have been
10 briefed and Mr. Greim said that are relevant to what
11 was requested, we ask that that claim be left out at
12 this point with no prejudice to them to bring it
13 later in the appropriate format.

14 THE COURT: All right. Anything else,
15 Ms. Serafimova?

16 MS. SERAFIMOVA: No, Your Honor. I think
17 one of our witnesses has stated she is available on
18 the 15th, and I'm hopeful that the second witness
19 will be available as well. If you give me a second,
20 I think I'm getting -- I'm seeing three dots moving.
21 So the 15th works for us. Thank you, Your Honor.

22 And, Mr. Greim, thank you so much for
23 understanding my situation.

24 THE COURT: All right. So I'll see y'all
25 on the 15th at 10:00 a.m. We'll try to get it done

1 in the middle of that day, and if not, we'll see
2 where we go.

3 All right. Y'all have a good afternoon.
4 Appreciate y'all making yourselves available.

5 (Recessed at 9:25 a.m.)
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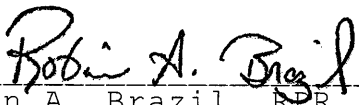
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